No. 307

Supreme Court of the United States.

OCTOBER TERM, 1945.

RICHARD T. GREEN COMPANY, M. THOMAS GREEN, TRUSTEE OF M. THOMAS GREEN TRUST, AND THE FIRST NATIONAL BANK OF BOSTON,

Petitioners,

v.

CITY OF CHELSEA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

AND

BRIEF IN SUPPORT THEREOF.

SAMUEL HOAR,
GEORGE K. GARDNER,
Attorneys for Petitioners.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

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Petitioners,

v.

CITY OF CHELSEA,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully submit their petition for a writ of certiorari to review the decision of the Circuit Court of Appeals for the First Circuit in the above-entitled case, numbered 4055 in the October 1944 Term of said Court.

Summary Statement of the Matter Involved.

This proceeding began with a taking by the United States of America (Rec. pp. 1-15) of the petitioners' property (Rec. pp. 16-18) consisting of about five acres of land

on the Chelsea waterfront in Boston Harbor as shown on a "Plan of the Richard T. Green Shipyard Property Plant No. 2" (Rec. p. 11). Compensation was fixed at $320,000, of which $180,000 was distributed to the petitioners and $140,000 retained in the registry of the District Court to cover $140,000 of taxes which the City of Chelsea had assessed on the property before the taking and which had not been paid (Rec. pp. 28-34).

The City of Chelsea claimed to have a lien and tax title on the land to secure these taxes (Rec. p. 24), which the petitioners denied (Rec. pp. 25-28). Upon this issue the District Court made a decree for the City of Chelsea (Rec. pp. 104-105), which the Circuit Court of Appeals affirmed on appeal (Rec. pp. 123-134).

The grounds of the petitioners' appeal from the District Court's decree are numerous (Rec. pp. 113-114); but only one of them is urged here. That ground is (1) that the "Marine Railway" shown on the Plan of the land taken (Rec. p. 11) consisted of a foundation, a track structure, a cradle, and hoisting machinery (Rec. pp. 81-82; 127-128); (2) that by far the greater part of the taxes in controversy were assessed on the foundation, the track structure, the cradle, the hoisting machinery, and the parcel of land on which they were located, valued and assessed as a single unit of real estate (Rec. pp. 79-84); (3) that by the law of Massachusetts the cradle and hoisting machinery were personal property and could only be taxed as such (Rec. p. 73, Requests 15, 16, 19); (4) that "the laws of Massachusetts at all times material to the issues required the assessors of Chelsea to place separate and distinct valuations on the [petitioners'] real estate and personal property and to assess separate and distinct taxes thereon" (Rec. p. 71, Request 4); and (5) that "the laws of Massachusetts at all times material to the issues were such that a single tax

assessed upon real and personal estate belonging to the same owner created no lien upon the real estate'' (Rec. p. 72, Request 11).

As will be seen from the record references, Propositions (1) and (2) of this chain of argument are taken from the District Court's findings, which were not disputed and which were adopted by the Circuit Court of Appeals. Propositions (4) and (5) were rulings of law which the petitioners asked for (Rec. pp. 71, 72, Requests 4, 11), which the District Court granted (Rec. p. 79) and which the Circuit Court of Appeals did not deny. Both the Circuit Court of Appeals (Rec. pp. 128-131) and the District Court (Rec. pp. 94-96) rested their decisions on the proposition that the cradle and hoisting machinery were properly taxed as real estate. Whether their decisions on this point were in accord with the law of Massachusetts is thus the only question now raised.

After the Circuit Court of Appeals had rendered its judgment the petitioners filed a petition for rehearing (Rec. pp. 135-153) setting up the following facts: The petitioner Richard T. Green Company owns another marine railway in Chelsea possessing physical characteristics which cannot be distinguished from those of the marine railway in this case (Rec. pp. 139-141). On April 9 to 12, 1945 (Rec. p. 136)—after the case in the Circuit Court of Appeals had been argued (Rec. p. 122)—there was tried in the Land Court of Massachusetts an action between the same parties in which the sole issue was the same as that now urged in this petition, *i.e.*, whether taxes assessed by Chelsea on this other marine railway, including the cradle and hoisting machinery, as a single parcel of real estate created any valid tax lien (Rec. pp. 136-142). At the trial of that action the Land Court of Massachusetts admitted testimony of assessors of other Massachu-

setts municipalities that it was not their custom to assess the cradles and hoisting machinery of marine railways as real estate (Rec. pp. 143-148). The petition for rehearing prayed (Rec. p. 153):

> "*First,* that a re-hearing be granted to be held after the final determination of the above-mentioned Land Court proceedings either by a judgment of the Land Court not appealed from or by a decision of the Supreme Judicial Court on appeal; *Second,* that upon such final determination this Court dispose of the petitioners' appeal to this Court in accordance with the Massachusetts law thereby established."

The petition for rehearing was denied on June 27, 1945.

We must here inform the Court of three facts which do not appear in the record, namely: That after June 15, 1945, when the petitioners filed their petition for rehearing (Rec. p. 134), and before June 27, 1945, when the Circuit Court of Appeals denied it (Rec. p. 154), (1) the Land Court decided the action referred to in the petition for rehearing in favor of the City of Chelsea, (2) the petitioners appealed to the Supreme Judicial Court from the Land Court's decision, and (3) the Circuit Court of Appeals was informed by counsel both of the Land Court's decision and of the petitioners' appeal.

Statement of This Court's Jurisdiction.

This Court has jurisdiction to review the judgment of the Circuit Court of Appeals by certiorari under section 240 of the Judicial Code; United States Code, title 28, chapter 9, section 347.

The Question Presented.

The question presented is whether the Circuit Court of Appeals ought to have granted the petitioners' prayer for a rehearing "to be held after the final determination of the above-mentioned Land Court proceedings either by a judgment of the Land Court not appealed from or by a decision of the Supreme Judicial Court on appeal."

Inasmuch as the record does not disclose any judgment at all of the Land Court, and inasmuch as there has not been in fact any "judgment of the Land Court not appealed from," it is plain that the petitioners have not had the rehearing for which they prayed.

Reasons Relied on for Allowance of the Writ.

The petitioners submit—

1. That the Circuit Court of Appeals has decided an important question of Massachusetts law in a way probably in conflict with applicable local decisions in that it has held the cradle and hoisting machinery to be taxable as real estate.

2. That this precise question of Massachusetts law is now in course of being finally determined by the Supreme Judicial Court of Massachusetts in a suit now pending between the very parties to this petition; and that it would be a grave injustice to the petitioners and a grave scandal to the administration of justice if the present case were disposed of in a manner contrary to the final disposition of the other case pending between the same parties in the State court.

3. That the allowance of the writ under these circumstances is sustained in principle by the decisions of this Court, and particularly by *Huddleston* v. *Dwyer*, 322 U.S. 232.

A brief in support of these propositions is hereto annexed.

WHEREFORE your petitioners respectfully pray—

1. That a writ of certiorari issue out of and under the seal of this Honorable Court to review the decision of the Circuit Court of Appeals for the First Circuit in the above case.

2. That the judgment of the Circuit Court of Appeals for the First Circuit in the above case be vacated.

3. That the Circuit Court of Appeals for the First Circuit be directed to grant the First and Second prayers of the petitioners' petition for rehearing (Rec. p. 153), namely: *First,* that a rehearing be granted to be held after the final determination of the case entitled *City of Chelsea, Petitioner,* v. *Richard T. Green Co. et al., Respondents,* No. 17653 T.L. in the Land Court of Massachusetts, either by a judgment of the Land Court not appealed from or by a decision of the Supreme Judicial Court on appeal; *Second,* that upon such final determination the Circuit Court of Appeals dispose of the petitioners' appeal in accordance with the Massachusetts law thereby established.

4. For such other and further relief in the premises as to this Honorable Court may seem proper.

RICHARD T. GREEN COMPANY,
M. THOMAS GREEN, TRUSTEE OF
M. THOMAS GREEN TRUST,
FIRST NATIONAL BANK OF BOSTON,
Petitioners.

SAMUEL HOAR,
GEORGE K. GARDNER,
Counsel for Petitioners.

Supreme Court of the United States.

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Petitioners,

v.

CITY OF CHELSEA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Opinions Below.

The opinion of the District Court for the District of Massachusetts relating to the issue presented by this petition is to be found in the Record at pages 94 to 96. It is reported in *United States* v. *Five Acres of Land*, 56 Fed. Supp. 628, esp. 629-631.

The opinion of the Circuit Court of Appeals for the First Circuit affirming the judgment of the District Court is to be found in the Record at pages 125 to 133, esp. 127-132, but has not yet been reported.

Jurisdiction.

The judgment of the Circuit Court of Appeals for the First Circuit affirming the District Court's decision was

entered on June 1, 1945 (Rec. p. 134). The order denying the petition for rehearing was entered June 27, 1945 (Rec. p. 154).

The jurisdiction of this Court is invoked under section 240(a) of the Judicial Code as amended, United States Code, title 28, section 347(a).

Statement of Facts.

The facts have been stated in the foregoing petition.

Specification of Errors.

It is submitted that the Circuit Court of Appeals erred—

1. In ruling that the law of Massachusetts permitted the cradle and hoisting machinery described in the petition to be taxed as real estate.

2. In ruling that the law of Massachusetts created a lien upon the land taken by the United States for taxes assessed on the foundation of the marine railway, the track structure, the cradle, the hoisting machinery, and the parcel of land on which they were located, valued and assessed as a single unit of real estate.

3. In affirming the judgment of the District Court.

4. In denying the First and Second prayers of the petitioners' petition for rehearing.

Statutes Involved.

The Massachusetts statutes which bear upon the issues are as follows:

General Laws, c. 59, sec. 3: "Real estate for the purpose of taxation shall include all land within the common-

wealth and all buildings and other things erected thereon or affixed thereto."

General Laws, c. 59, sec. 4: ". . . personal estate for the purpose of taxation shall include . . . goods, chattels . . ."

General Laws, c. 59, sec. 5: "The following property . . . shall be exempt from taxation . . . Sixteenth, Property, other than real estate, poles, underground conduits, wires and pipes, and other than machinery . . ." [thus distinguishing "machinery" from "real estate"].

General Laws, c. 59, secs. 45 and 46 [which make careful provision for assessing real and personal property on separate lists].

General Laws, c. 60, sec. 37: "Taxes assessed upon land, . . . shall with all incidental charges and fees be a lien thereon . . ."

Argument.

FIRST: THE CIRCUIT COURT OF APPEALS ERRED IN RULING THAT THE LAW OF MASSACHUSETTS PERMITTED THE CRADLE AND HOISTING MACHINERY DESCRIBED IN THE PETITION TO BE TAXED AS REAL ESTATE.

Upon this question we know of only four pertinent decisions of the Supreme Judicial Court of Massachusetts, all of which are cited in the opinion of the Circuit Court of Appeals (Rec. pp. 129-121):

> *Milligan* v. *Drury*, 130 Mass. 428:
>
> Holding that "two wooden houses and a stable . . . the sills [of which] rested upon timbers laid on the top of the ground" were properly taxed as real estate.

Hall v. *Carney,* 140 Mass. 131:

Holding that the railroad cars on a "railroad . . . located entirely within the limits of the town of Grafton in this Commonwealth . . . of narrow gauge, and the rolling stock [of which] cannot be run on the track of any other railroad in its vicinity" were properly attached as personal property.

Hamilton Manufacturing Company v. *Lowell,* 185 Mass. 114:

Holding that the manufacturing machinery in a cotton mill must be taxed as personal property and could not properly be assessed with the land and mill buildings.

Franklin v. *Metcalfe,* 307 Mass. 386:

Holding that a lunch cart which "stands 'on its own wheels on abutments which are four cement poles' [and with] a brick veneer wall . . . around three sides of the lunch cart," the fourth side being " 'up against' the wall of another building" was properly assessed as a part of the real estate.

The Circuit Court of Appeals seems to have concluded from these decisions that the question whether the cradle and machinery were taxable as real or personal property was one of degree to be determined by weighing the various factors which "impressed" the Court (Rec. p. 129). It seems to us that such is not the conclusion to be drawn. The distinction indicated by the cases seems to us to be between stationary structures used to render some definite place suitable for the carrying on of some activity, and moving or movable apparatus by means of

which some activity may be carried on. This, we submit, is the distinction taken by the common understanding of real and personal property and by the decisions of the Supreme Judicial Court. It was the distinction taken by the Boston and Quincy assessors—sworn officers of Massachusetts cities—who testified in the Land Court case (Rec. pp. 143-148). If that is the correct distinction, the cradle and hoisting machinery were not properly assessed as real estate. We do not elaborate the argument because we do not ask this Court to rule on it. We ask only that the Circuit Court of Appeals be directed to await the decision of the highest court of the state.

SECOND: THE CIRCUIT COURT OF APPEALS ERRED IN RULING THAT THE LAW OF MASSACHUSETTS CREATED A LIEN UPON THE LAND TAKEN BY THE UNITED STATES FOR TAXES ASSESSED ON THE FOUNDATION OF THE MARINE RAILWAY, THE TRACK STRUCTURE, THE CRADLE, THE HOISTING MACHINERY, AND THE PARCEL OF LAND ON WHICH THEY WERE LOCATED, VALUED AND ASSESSED AS A SINGLE UNIT OF REAL ESTATE.

We do not understand it to be disputed that this proposition follows inevitably if the first proposition is correct. The District Court allowed the appellants' requested ruling (Rec. p. 79) that—

> "11. The laws of Massachusetts at all times material to the issue were such that a single tax assessed upon real and personal estate belonging to the same owner created no lien upon the real estate" (Rec. p. 72).

That this ruling was correct follows necessarily from the fact that there is no lien for taxes in Massachusetts except by statute—

Dunham v. *Lowell*, 200 Mass. 468 (p. 469):

> "Indeed there never is any lien upon real estate for taxes unless given by statute . . ."—

and from the text of Mass. General Laws, c. 60, sec. 37, which reads that—

> "SECTION 37. Taxes assessed upon land . . . shall with all incidental charges and fees be a lien thereon . . ."

See also—

> *Hamilton Manufacturing Company* v. *Lowell*, 185 Mass. 114 (p. 117):
>
> "Under our statutes and decisions, real estate and personal estate are two distinct classes of property for the purpose of taxation. . . . Taxes upon real estate are a lien upon the property, and may be collected by a sale of it, while taxes upon personal property cannot be collected in this way."

THIRD: THE CIRCUIT COURT OF APPEALS ERRED IN AFFIRMING THE JUDGMENT OF THE DISTRICT COURT.

This follows necessarily from the FIRST and SECOND propositions and from the fact that by far the greater part of the disputed tax lien rests upon the erroneous rulings there alleged (Rec. pp. 79-84).

FOURTH: THE CIRCUIT COURT OF APPEALS ERRED IN DENYING THE FIRST AND SECOND PRAYERS OF THE PETITIONERS' PETITION FOR REHEARING.

We recognize that this proposition goes somewhat beyond any adjudicated decision of this Court. But we submit that it is supported in principle by this Court's deci-

sions, and by the demands of practical justice in the present case.

The Court is familiar with the long series of recent cases in which it has repeatedly affirmed the duty of Federal courts, when confronted with a question of State law for decision, to make every practicable effort to decide it as it would be decided if presented to the State courts.

Erie Railroad Company v. *Tompkins,* 304 U.S. 64.

Fidelity Union Trust Company v. *Field,* 311 U.S. 169.

Six Companies of California v. *Joint Highway District,* 311 U.S. 180.

West v. *American Telephone & Telegraph Company,* 311 U.S. 223.

Vandenbark v. *Owens-Illinois Glass Company,* 311 U.S. 538.

Moore v. *Illinois Central Railroad Company,* 312 U.S. 630.

Klaxon Company v. *Stentor Electric Manufacturing Company,* 313 U.S. 487.

The latest of this series which has come to our attention is—

Huddleston v. *Dwyer,* 322 U.S. 232—

where this Court held it to be the duty of a Circuit Court of Appeals—after it had rendered its decision and denied one petition for rehearing—to grant a second petition for rehearing for the purpose of ascertaining whether an intervening decision of the highest court of Oklahoma did or did not establish the proposition that its ruling as to the law of Oklahoma was wrong.

Ideally, the doctrine of these decisions calls for a system of appeals from Federal to State courts on State ques-

tions, precisely as the decisions of State courts upon Federal questions may be reviewed upon certiorari by this Court. The Circuit Court of Appeals for the Seventh Circuit has perceived this, and has ruled, in a case substantially on all fours with the present, that the parties should be remitted to the State court to determine the contested question of the validity of the State tax lien.

United States v. *150.29 Acres of Land in Milwaukee County,* 135 Fed. 878:

> (P. 881.) "On the second question, as to when the lien for taxes attached, we are unable from an examination of the authorities to answer to our complete satisfaction the question as to when the lien for taxes does attach under the Wisconsin law. This is a matter of vital concern to Wisconsin. We hesitate to intrude ourselves into a situation that requires us to make a decision as to what the law of Wisconsin is, when we are not able to discern with assurance what that law is. Since we are in doubt as to what the law of Wisconsin is on that point, we think it advisable to remand the case to the District Court with instructions to retain jurisdiction until the parties can seek the answer to this question in the courts of Wisconsin [citations omitted]. This course is clearly indicated, because the controversy is in its last analysis one between a taxpayer and a taxing unit of Wisconsin. It is a Wisconsin question, of primary interest to Wisconsin and its taxpayers.
>
> "The cause is remanded to the District Court to retain jurisdiction until the parties can litigate the question here raised in the courts of Wisconsin, or otherwise dispose of the case."

The record and briefs in the case just cited do not disclose that any specific proceedings in the courts of Wisconsin

were then either pending or proposed. Perhaps, therefore, it may be contended that the case is overruled on its facts by this Court's decision in—

Meredith v. *Winter Haven,* 320 U.S. 228.

But in *Meredith* v. *Winter Haven* the lower court had dismissed the suit—it had not, as here and in *United States* v. *150.29 Acres of Land,* retained jurisdiction. And in neither *United States* v. *150.29 Acres of Land* nor *Meredith* v. *Winter Haven* was there another proceeding already pending in the State court between the same parties in which the precise question before the Federal court was the only question to be resolved. Where—as in the present case—there is a pending State court proceeding between the same parties which is not removable and which can operate in substance as an appeal from the Federal courts to the State's court of last resort, we submit that the Federal court should await the outcome of that appeal. The practical reasons for such action seem to us not less weighty than the practical reasons for the rule which was stated as follows in *Meredith* v. *Winter Haven, supra,* by this Court (320 U.S. 236):

> "So too a federal court, adhering to the salutary policy of refraining from the unnecessary decision of constitutional questions, may stay proceedings before it, to enable the parties to litigate first in the state courts questions of state law, decision of which is preliminary to, and may render unnecessary, decision of the constitutional questions presented. *Railroad Commission* v. *Pullman Co.,* 312 U.S. 496; cf. *Thompson* v. *Magnolia Petroleum Co.,* 309 U.S. 478. It is the court's duty to do so when a suit is pending in the state courts, where the state questions can be conveniently and authoritatively answered, at least where

the parties to the federal court action are not strangers to the state action. *Chicago* v. *Fieldcrest Dairies*, 316 U.S. 168."

To do otherwise is to risk contradictory decisions of the same issue between the same parties which could not well appear otherwise than as a plain denial of justice to laymen unfamiliar with the mysteries of the law.

Conclusion.

For the reasons above given and on the authority of the cases cited, it is respectfully submitted that the writ of certiorari should be granted.

Respectfully submitted,

SAMUEL HOAR,

GEORGE K. GARDNER,

Counsel for Petitioners.

No. 307.

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RICHARD T. GREEN COMPANY, M. THOMAS GREEN, TRUSTEE OF M. THOMAS GREEN TRUST, AND THE FIRST NATIONAL BANK OF BOSTON,

Petitioners,

v.

CITY OF CHELSEA,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

MICHAEL H. SULLIVAN,
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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

Opinions Below.

The opinion of the District Court for the District of Massachusetts relating to the question presented by the Petition is to be found in the Record at pages 93, 94 to 96, and is reported in *United States* v. *Five Acres of Land et al.*, 56 Fed. Supp. 628, 629 to 631.

The opinion of the Circuit Court of Appeals for the First Circuit affirming the judgment of the District Court

is to be found in the Record at pages 123, 125, 127 to 132, and is reported in 149 F. (2d) 927.

Jurisdiction.

The jurisdiction of this Honorable Court is invoked under section 240 (a) of the Judicial Code, as amended, United States Code, Title 28, sec. 347 (a).

Supplementary Statement of the Case.

The action in the Land Court of Massachusetts referred to in the Petition at page 4 was decided on June 15, 1945, and the Decision of the Land Court is to be found in Appendix A of this brief, at page 7.

The specific question presented by the Petition (at page 5) is "whether the Circuit Court of Appeals ought to have granted the petitioners' prayer for a rehearing 'to be held after the final determination of the above-mentioned Land Court proceedings either by a judgment of the Land Court not appealed from or by a decision of the Supreme Judicial Court on appeal.'" It would appear, however, that the fundamental contention of the petitioners (*cf.* Petition, pp. 3 and 5) is that "the Circuit Court of Appeals has decided an important matter of Massachusetts law in a way probably in conflict with applicable local decisions in that it has held the cradle and hoisting machinery to be taxable as real estate."

Statute Involved.

The statute of the Commonwealth of Massachusetts bearing upon the issue raised by the petitioners is as follows:

General Laws (Ter. Ed.) c. 59, sec. 3: "Real estate for the purpose of taxation shall include all land within the commonwealth and all buildings and other things erected thereon or affixed thereto."

Argument.

First Point: IT IS SUBMITTED THAT NEITHER THE RECORD, THE PETITION NOR THE BRIEF IN SUPPORT OF THE PETITION AFFORDS ANY BASIS FOR THE PETITIONERS' CONTENTION THAT THE CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF MASSACHUSETTS LAW IN A WAY PROBABLY IN CONFLICT WITH APPLICABLE LOCAL DECISIONS.

This issue deals with that portion of the opinion of the Circuit Court of Appeals which held that the aggregation of the component parts of the marine railway—the cradle, the machinery, the foundation and the track—was an entity properly assessed as real estate within the coverage of Gen. Laws (Ter. Ed.) c. 59, sec. 3 (Record, pp. 129, 130).

Three different Courts in the Commonwealth—two Federal and one State—have passed upon the issue raised by the petitioners. The decisions and opinions of all three Courts have carefully reviewed pertinent local decisions, including cases in the Supreme Judicial Court and in intermediate State Courts. These decisions go back to *Boston Manufacturing Company* v. *Newton,* 22 Pick. (Mass.) 22, decided in 1839, and down to *Franklin* v. *Metcalfe,* 307 Mass. 386, decided in 1940. They include cases from the Massachusetts Board of Tax Appeals and Appellate Tax Board. *Crocker-McElwain Company* v. *Board of Assessors of Holyoke,* 2 Mass. Board of Tax Appeals Appellate Tax Board Reports, 159. They include cases from the Massachusetts Superior Court. *Hamilton Manufacturing Company* v. *Lowell* (see Record, p. 130, note 6).

In the course of its opinion the Circuit Court of Appeals made an analysis of cases cited by the petitioners; some of these decisions are shown to support the respondent's interpretation of the statute involved, and others are not in point. *Cf.* Record, pp. 128 to 131, and Brief in Support of Petition, pp. 9 and 10; see Appendix A, pp. 10 and 11.

The respondent submits that the various factors which impressed the Court (Record, p. 129; Brief in Support of Petition, p. 10) warranted the conclusion, in conformity with the applicable state law, that the marine railway as an entity was properly assessed as real property within the meaning of Gen. Laws (Ter. Ed.) c. 59, sec. 3. It is therefore contended that the cases cited in Brief in Support of Petition at pages 13 to 16 do not bear out the argument of the petitioners.

Second Point: THE FACT THAT THE PETITIONERS HAVE APPEALED FROM THE DECISION OF THE LAND COURT (PETITION, P. 4) TO THE SUPREME JUDICIAL COURT DOES NOT INDICATE THAT THE CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF MASSACHUSETTS LAW IN A WAY *probably* IN CONFLICT WITH APPLICABLE LOCAL DECISIONS.

The respondent submits that the applicable local law has been invoked by the Circuit Court of Appeals. It may be *possible* that the Supreme Judicial Court will overrule a principle of law which has been followed for more than a hundred years in the Commonwealth. It is not *probable.* Under such circumstances, the possibility of reversal by the Supreme Judicial Court remains a matter of conjecture, particularly when the applicable law has been authoritatively declared, not only by intermediate Courts but also by the highest State Court itself.

Cf. *West* v. *American Telephone & Telegraph Company,* 311 U.S. 223, 237.

Third Point: THE RESPONDENT SUBMITS THAT THE CIRCUIT COURT OF APPEALS DID NOT ERR IN DENYING THE FIRST AND SECOND PRAYERS OF THE PETITIONERS' PETITION FOR REHEARING (Record, pp. 153, 154).

On this point the petitioners admit: "We recognize that this proposition goes somewhat beyond any adjudicated decision of this Court" (Brief in Support of Petition, p. 12). Immediately following, however, the petitioners argue that this proposition is supported in principle by this Court's decisions and by the demands of practical justice in the present case.

The respondent submits that neither the decisions quoted nor the demands of practical justice call for this Honorable Court to interfere in a case where the Circuit Court of Appeals has followed the ascertainable and applicable local law as enunciated by the highest State Court and as declared by the Massachusetts Land Court in its Decision on June 15, 1945.

The latest of the series of cases cited by the petitioners does not support the petitioners' proposition (*Huddleston* v. *Dwyer*, 322 U.S. 232, 235, 236). In that case an opinion of the Oklahoma Supreme Court, handed down after the denial of a petition for rehearing in the Circuit Court of Appeals, had at least raised such doubt as to the applicable Oklahoma law as to require its re-examination in the light of that opinion before pronouncement of a final judgment in the case by the Federal Courts. In the case at bar, however, there is no local decision which raises a doubt as to the applicable state law. There is no persuasive evidence that the Supreme Judicial Court will reverse the decision of the Land Court based upon applicable local law and decide the question contrary to the judgment of the United States District Court which was affirmed by the Circuit Court of Appeals.

"Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise."

West v. *American Telephone & Telegraph Company,* 311 U.S. 223, 237.

Conclusion.

THE RESPONDENT SUBMITS THAT THE CIRCUIT COURT OF APPEALS HAS NOT DECIDED A QUESTION OF MASSACHUSETTS LAW IN A WAY PROBABLY IN CONFLICT WITH APPLICABLE LOCAL DECISIONS; THAT THE CONTENTION OF THE PETITIONERS IS NOT GIVEN ANY ADDITIONAL WEIGHT BECAUSE OF THE FACT THAT THEY HAVE APPEALED FROM THE DECISION OF THE LAND COURT TO THE SUPREME JUDICIAL COURT; AND THAT THE CIRCUIT COURT OF APPEALS PROPERLY DENIED THE FIRST AND SECOND PRAYERS OF THE PETITIONERS' PETITION FOR REHEARING.

THE RESPONDENT RESPECTFULLY SUBMITS THAT THE PETITION FOR WRIT OF CERTIORARI IN THIS CASE SHOULD BE DENIED.

Respectfully submitted,

MICHAEL H. SULLIVAN,
Counsel for Respondent.

JOSEPH ISRAELITE,
Of Counsel.

Appendix A.

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

Suffolk, ss. Land Court
Case No. 17653 T.L.

CITY OF CHELSEA
vs
RICHARD T. GREEN COMPANY *et alii*

DECISION

This is a petition filed in the Land Court on April 29, 1940 to foreclose all rights of redemption under fourteen tax titles acquired by the petitioner on October 1, 1934 for the non-payment of taxes, which were assessed for the year 1932 on the parcels of land described in the petition which are situated in the City of Chelsea, G.L. (Ter. Ed.) c. 60, s. 65; St. 1933, c. 325, s. 12; St. 1938, c. 305.

The respondent, Richard T. Green Company, filed an answer and amendments thereto as provided in G.L. (Ter. Ed.) c. 60, s. 68 as amended by St. 1935, c. 224, s. 3; c. 354, s. 1; and c. 414, s. 3, in which it contends that the petitioner's tax title is invalid and sets forth as required by G.L. (Ter. Ed.) c. 60, s. 70, specifications on which it relies to defeat the tax title. It also seeks to redeem all the land described in the petition.

It was agreed at the trial that the sole question raised as to the validity of the tax title depended upon whether the cradle or its motivating machinery or both, located on what was called at the trial, and is hereinafter called parcel 18, but which is in fact parcel 4 as described in the

petition (Exhibit 1-K) and Lot 18 on Shearer's Plan of Winnisimmet dated 1832 and recorded with the Suffolk County Registry of Deeds at the end of Book 616, and assessed as real estate, were real estate or personal property during the years in question, and the case was tried on the above points and the amount that the taxpayer will be required to pay upon redemption of parcel 18 depending upon the determination of the foregoing question.

It was also agreed that the details of the assessments for the years 1932 to 1938, both inclusive, on parcel 18 were as follows:

Year	Bldg. Description	Bldg. Value	Area	Land Value	Total
1932	Marine Docks	$30,000.	40,711 sq. ft.	$12,000.	$42,000.
1933	Marine Docks	30,000.	40,711 sq. ft.	12,000.	42,000.
1934	Marine Docks	30,000.	40,711 sq. ft.	12,000.	42,000.
1935	Marine Docks	30,000.	40,711 sq. ft.	12,000.	42,000.
1936	Marine Docks	30,000.	40,711 sq. ft.	12,000.	42,000.
1937	Marine Docks	25,000.	40,711 sq. ft.	12,000.	37,000.
1938	Marine Docks	25,000.	40,711 sq. ft.	12,000.	37,000.

Thereafter, only the land was assessed because the so-called "Marine Docks" had been removed from the property.

It was also agreed that the words "Marine Docks" in the assessments above described meant the marine railway hereinafter described together with all its component parts, including the foundation, the tract structure, the cradle and the hoisting machinery hereinafter described, and that the taxes assessed on parcel 18 in the years 1932 through 1938 both inclusive, were assessed upon the land constituting said parcel together with said "Marine Docks", and that the whole was assessed as a single parcel of real estate.

It was further agreed that the marine railway consisted of a foundation, a track structure, a cradle, and hoisting machinery. The foundation upon which the track rests is constructed of wood and rests on piling which was driven and cut for the required slope. The cradle itself is two hundred thirty feet long and, including the stone ballast, weighs approximately 530 tons. It could safely carry 2,000 tons. The hoisting machinery, contained in a building, and consisting of a winch and steam engine, is set on bolts and secured by nuts. The bolts range in length from 5 to 6 feet and are fastened to a wood foundation. The marine railway contains all the essentials of a drydock. The cradle travels up and down the inclined railway. The upper end of the track is above water, and the lower end is in considerable depth of water, so that when the cradle is all the way down, a ship can be floated onto it, and then the cradle can be pulled up the incline, bringing the ship with it. The incline of the marine railway is at a grade of one to twelve, this incline having been found adaptable for the particular location. The cradle is not attached to the understructure in any way, but just rests on it. The cradle operates on a series of free rollers on flat metal rails, and the power for pulling it is a system of four endless chains attached to the cradle and passing over sprockets on a big geared winch and around sheaves. The weight of the foundation and the hoisting machinery is approximately 40 to 50 tons. The machinery, consisting of a winch and the steam engine which operates it, is set on long bolts imbedded in a heavy wood timber foundation inside the boiler house located on high land on the upper end of the marine railway, and said machinery is kept in place by large nuts screwed onto these bolts. The machinery could be removed by unfastening the nuts and lifting the machinery off the foundation. The cradle could be removed from the particular location to another location either by

removing its ballast or by the use of lighters to make it float. However, if it were removed to a new location, a new track and foundation would have to be built in order to accommodate this particular cradle. The cradle was constructed on the premises. The marine railway could not function without the cradle or without the tracks or without the chains and rollers or without the machinery. It requires the unity of the entire structure and all its component parts for operation as a marine railway.

It is said in Hamilton Manufacturing Company vs. Lowell, 185 Mass. 114 at 117, "Under our statutes and decisions, real estate and personal estate are two distinct classes of property for the purpose of taxation. Preston v. Boston, 12 Pick. 7. Howe v. Boston, 7 Cush. 273. Lowell v. County Commissioners, 3 Allen, 546. Taxes upon real estate are a lien upon the property, and may be collected by a sale of it, while taxes upon personal property cannot be collected in this way." See also Dunham vs. Lowell, 200 Mass. 468.

G.L. (Ter. Ed.) c. 59, s. 3 provides "real estate for the purpose of taxation shall include all land within the commonwealth with all buildings and other things erected thereon or affixed thereto". Thus land and buildings and other things "erected thereon and affixed thereto" are properly taxed as a unit and this rule is not affected by the degree of physical attachment to the land. Milligan v. Drury, 130 Mass. 428, 430. McGee v. Salem, 149 Mass. 238, 240. Paine v. Assessors of Weston, 297 Mass. 173, 175. Franklin v. Metcalfe, 307 Mass. 386, 389. Cook vs. Assessors of Wellfleet, 1 Mass. Board of Tax Appeals Reports 128. See also Callahan v. Broadway National Bank of Chelsea, 286 Mass. 473. Crocker-McElwain Co. v. Assessors of Holyoke, 296 Mass. 338, 345. When the last mentioned case was before the Board of Tax Appeals it was held that "Boilers, railroad sidings, underground pip-

ing, yard equipment and hydraulic structures, whether they are to be classed with the land or the buildings where they are located, are properly included as part of the real estate". Crocker-McElwain Company v. Board of Assessors of Holyoke, 2 Mass. Board of Tax Appeals and Appellate Tax Board Reports, 159.

It is pertinent to say that the question of whether a cradle and its motivating machinery or both are real or personal property was tried in the United States District Court and is reported in 56 Federal Supplement 628. This case was appealed to the United States Circuit Court of Appeals for the First Circuit, which handed down an opinion on June 1, 1945 affirming the decision of the United States District Court which held that the cradle and hoisting machinery in the case were properly assessed as real estate. The cradle and motivating machinery discussed in this case are not the same as the cradle and motivating machinery discussed in the case before the Federal Courts. Thus while the decision of the Federal Courts is not binding on the Land Court in the instant case, nevertheless I am constrained to agree with both the reasoning and the conclusion reached by said courts.

The respondent does not claim that the foundation and the track structure are not properly assessed as a part of the real estate. As to a cradle and machinery, the United States District Court said: "The cradle and machinery were constructed, erected and installed on the land for the purpose of operating as a marine railway, together with other integral parts which are unquestionably real estate. . . . All of the component parts of the marine railway operate as a unit. If the cradle were moved, a new foundation and track would have to be built to conform with the dimensions of the cradle. If the machinery were moved, it could be used again only in connection with a marine railway. The cradle, the machinery, the foundation and

the track, being attached to each other (even the cradle is attached by means of the chains) and built to operate in conjunction with each other for a single purpose, should be considered as an entity. This is particularly true when considered with the degree of physical attachment and affixation and the weight of the cradle and machinery."

No useful purposes will be served by an extensive discussion of the evidence. It is sufficient to say that I have carefully examined and considered the stenographic record of the case, including the testimony of the expert for each party, the arguments and all the exhibits and as a result thereof and upon all the evidence I find that both the cradle and the hoisting machinery were integral parts of the marine railway which was composed of its aggregate parts attached to each other and built to operate in conjunction with each other as an entity, and I rule that the whole entity, including the cradle and hoisting machinery, was properly assessed as real estate within the provisions of G.L. (Ter. Ed.) c. 59, s. 3. Franklin vs. Metcalfe, 307 Mass. 386.

Hall vs. Carney, 140 Mass. 131; Metropolitan Ice Company vs. Assessors of Cambridge, 1939 Appellate Tax Board Advance Sheets 105; and Hamilton Manufacturing Company vs. Lowell, 185 Mass. 114, cited by the respondent are distinguishable.

I further rule as a result of what has been said and upon all the evidence that the tax titles are valid. The respondent asked to be permitted to redeem the real estate if the tax titles were determined to be valid and agreed with the petitioner as to amount necessary to redeem, if the cradle and hoisting machinery were determined to be real property. The respondent may, therefore, redeem upon the payment of the agreed sum of $108,357.16, to which is to be added interest at the statutory rate from April 15, 1945 and Land Court costs of $128.50.

The petitioner made fourteen requests for rulings which for the purpose of identification are marked "Exhibit A". These are treated as waived in view of the agreement in open court that they would be waived if the decision was in its favor.

The respondent made fourteen requests for rulings which for the purpose of identification are marked "Exhibit B". I give Nos. 1, 2, 3, 4, and 5. I refuse Nos. 6, 7, 8, 9, 10, 11, 12, 13, and 14 because either they are unnecessary, immaterial, contrary to the facts found by me or contrary to the law. All exhibits introduced in evidence at the trial are for the purpose of any appeal incorporated herein by reference.

So ordered.

JOHN E. FENTON
Judge

Dated: June 15, 1945